2006

Burton Lumber and Hardware Co. v. Michael Graham : Brief of Appellant

Utah Court of Appeals

Richard D. Burbidge; Burbidge & Mitchell; Attorney for Plaintiff and Appellee.
David G. Harlow; Attorney for Defendant and Appellant.

IN THE UTAH COURT OF APPEALS

BURTON LUMBER & HARDWARE CO., Plaintiff and Appellee,	)	
vs.	)	
MICHAEL GRAHAM, Defendant and Appellant.	)	Case No. 20060912 Dist. Ct. No. 010404278 Class

APPELLANT'S BRIEF

Richard D. Burbidge, Bar # 492
Burbidge & Mitchell
Parkside Tower
215 S. State Street, Suite 920
Salt Lake City, UT 84111
(801) 355-6677

Attorney for Plaintiff and Appellee

David G. Harlow, Bar # 8985
1855 N. Oak Lane
Provo, Utah 84604
(801) 373-8244

Attorney for Defendant and Appellant

IN THE UTAH COURT OF APPEALS

BURTON LUMBER & HARDWARE CO., Plaintiff and Appellee,	)	
vs.	)	
MICHAEL GRAHAM, Defendant and Appellant.	)	Case No. 20060912 Dist. Ct. No. 010404278 Class

APPELLANT'S BRIEF

Richard D. Burbidge, Bar # 492
Burbidge & Mitchell
Parkside Tower
215 S. State Street, Suite 920
Salt Lake City, UT 84111
(801) 355-6677

Attorney for Plaintiff and Appellee

David G. Harlow, Bar # 8985
1855 N. Oak Lane
Provo, Utah 84604
(801) 373-8244

Attorney for Defendant and Appellant

PARTIES TO PROCEEDINGS BELOW

Plaintiff: Burton Lumber & Hardware Company

Defendant: Michael Graham

TABLE OF CONTENTS

ATTACHED ADDENDUM TABLE OF CONTENTS

UNATTACHED ADDENDUM TABLE OF CONTENTS

William Weir's Claim to a Percentage of Defendant's Profits – identified, offered, and rejected (R. 3347 at p. 1379, line 13 through p. 1382, line 4)

Exhibit H. Defendant's *unreceived* Exhibit 141: Dan Burton's August 4, 1999Affifdavit Regarding Inventory Adjustments Affecting William Weir's Claim to a Percentage of Defendant's Profits – identified, offered, and rejected (R. 3347 at p. 1379, line 13 through p. 1382, line 4)

Exhibit I. Defendant's *unreceived* Exhibit 144: Dan Burton's June 14, 2002 Affidavit Which Includes Plainitff's Three Stated Reasons for Terminating Defendant's Employment – filed (R. 160) by plaintiff in support of plaintiff's Memorandum in Opposition to Defendant's Motion for Leave of Court to Amend Defendant's Answer and Counterclaim (R. 178); discussed in detail at trial in conjunction with defendant's successful oral motion for dismissal of plaintiff's fraud claim (R. 3346 at p. 805, line 13 through p. 845, line 22); but never offered or received as an Exhibit

Exhibit J. Defendant's *unreceived* Exhibit 149: Defendant's Calculations Relating to Six Hamlet Homes Jobs – identified, offered, and rejected (R. 3350 at p. 1798, line 9 through p. 1800, line 7)

Exhibit K. Defendant's *unreceived* Exhibit 155: Klay Clawson's Post-It Note Regarding the Two Hamlet Homes Jobs (Which Gave Rise to the $7,293 Hamlet Homes Check) Being Defendant's, Not Plaintiff's – identified, offered, and rejected (R. 3349 at p. 1142, line 3 through p. 1147, line 10)

Exhibit L. Defendant's *unreceived* Exhibit 164: Plaintiff's Response to Defendant's Unemployment Claim – identified, offered, and rejected (R. 3347 at p. 1313, line 4 through p. 1319, line 17)

Exhibit M. Defendant's *unreceived* Exhibit 183: Documents Regarding Wall Panel Plant Lease and Related Repair and Other Obligations – identified, offered, and rejected (R. 3348 at p. 1680, line 22 through p. 1684, line 6)

Exhibit N. Defendant's *unreceived* Exhibit 188: Affidavits of David Kerlin Regarding Wall Panels (Which Gave Rise to the $7,293 Hamlet Homes Check) Being Manufactured When Defendant

Was Vacationing at Disneyland – identified, offered, and rejected (R. 3349 at p. 1083, line 15 through p. 1084, line 9)

Exhibit O. Defendant's *unreceived* Exhibit 215: Summary of Allocations of Corporate Expenses to the Wall Panel Plant – identified, offered, and rejected (R. 3348 at p. 1615, line 22 through p. 1616, line 6)

Exhibit P. Defendant's *pending unreceived* Exhibit 217: Documentation of Various Saw Blade Purchases – identified, offered, with acceptance/rejection pending based on the trial court's review of the Klay Clawson Deposition (R. 3348 at p. 1673, line 15, through p. 1677, line 2)

Exhibit Q. Defendant's *pending unreceived* Exhibit 218: July 13, 2001 Generator Lease from Plaintiff to Framer Oscar Lacayo – identified, offered, with acceptance/rejection pending based on the trial court's review of the Klay Clawson Deposition (R. 3348 at p. 1673, line 15, through p. 1677, line 2)

Exhibit R. Defendant's *pending unreceived* Exhibit 223: Plaintiff's Invoice to R4eliance Homes for Wall Panels Purchased from Defendant – identified, offered, with acceptance/rejection

pending based on the trial court's review of the Klay Clawson Deposition (R. 3348 at p. 1673, line 15, through p. 1677, line 2)

Exhibit S. Defendant's *pending unreceived* Exhibit 224: Klay Clawson List of Various hamlet Homes Jobs – identified, offered, with acceptance/rejection pending based on the trial court's review of the Klay Clawson Deposition (R. 3348 at p. 1673, line 15, through p. 1677, line 2)

Exhibit T. Defendant's *unreceived* Exhibit 225: Plaintiff's 2/8/01 Truss Quotation for Lakeridge Homes "Elms" Model – identified, offered, and rejected (R. 3348 at p. 1690, line 13, through p. 1709, line 14)

Exhibit U. Defendant's *unreceived* Exhibit 226: Defendant's Calculation of per Square Foot Pricing for Lakeridge Homes "Elms" Model – identified, offered, and rejected (R. 3348 at p. 1719, line 15, through p. 1722, line 22)

Exhibit V. Defendant' Exhibit 229: Klay Clawson's Post-It Note Regarding the Two Hamlet Homes Jobs (Which Gave Rise to

TABLE OF AUTHORITIES

Cases:

Statutes:

Other Authorities:

JURISDICTION

Jurisdiction is proper. Utah Code Ann. Section 78-2a-3(2)(j).

ISSUES PRESENTED FOR REVIEW

The issues presented for review along with the respective standards of appellate review and supporting authority are set forth in Appellant's October 19, 2006 Docketing Statement. The issues were preserved in the trial court record at: 2160-2164; 2168-2172; 2365-2379; 2387-2390; 2490-2530; 2702-2749; 2829-2840; 2842-2843; 2872-2902; 2935-2938; 2947-2950; 2953-2977; 2985-2987; 3062-3073; 3079; 3087-3094; 3290-3312; 3317-3318; 3347 at pp. 313-1319, 1379-1385, 1396; R. 3348 at pp. 1604-1619, 1673-1677, 1680-1684, 1687-1726, 1766-1778; 3349 at pp. 1155-1192, 1195; 3350 at pp. 1798-1802, 1804-1805, 1845, 1853-1854, 1886; 3350 at pp. 2028-2029, 2057-2060. See Attachment 1 for preservation by issue.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, AND REGULATIONS

1. Rule 56(d), Utah Rules of Civil Procedure:

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court . . . shall . . . specify[] the facts that appear without substantial controversy . . . . Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

2. Rule 1004, Utah Rules of Evidence:

Rule 1004. Admissibility of other evidence of contents.
The original is not required, and other evidence of the content of a writing, recording, or photograph is admissible if:

(1) *Originals lost or destroyed.* All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) . . . .

(3) *Original in possession of opponent.* At the time the original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; . . . .

STATEMENT OF THE CASE

Nature of the Case and Proceedings Below

Plaintiff filed a Complaint (R. 13) and defendant filed the Answer and Counterclaim (R. 29). Defendant filed the First Amended Answer and Counterclaim (R. 209) and plaintiff filed an Amended Complaint (R. 697). Plaintiff filed a Motion for Partial Summary Judgment (R. 1071). The Ruling on plaintiff's Motion for Partial Summary Judgment (R. 2379) includes 47 numbered paragraphs in the "Undisputed Facts" section. The Partial Summary Judgment (R. 2390) includes only 12 numbered paragraphs in the "Undisputed Findings of Facts" section. R. 2389.

An 8-day bench trial was held over a five-month period and resulted in a Ruling (R. 2843) of judgment for plaintiff: (i) of $5,841.57 [$7,293.00 less $1,451.43 relating to defendant's final paycheck] for the Hamlet Homes check; (ii) of $2,148.00 for the rental of defendant's generator; (iii) of $7,517.59 for conversion of plaintiff's property. The Ruling also stated that: "There being no statutory or contractual bases for an award of attorney fees, both parties are obligated for their own attorney's fees and costs incurred by them in the matter." (R. 2828).

Contrary to the Ruling, plaintiff filed a Motion for an Award of Attorney's Fees (R. 2846) and the trial court reversed itself, stating that: "Although the Court's Ruling [Re: Plaintiff' Complaint and Defendant's Counterclaim (R. 2843)] did not provide for an

award of attorney's fees, the Court finds that Plaintiff has shown, by a preponderance of the evidence, that Plaintiff is indeed entitled to attorney's fees under paragraph 9 of the [purchase/employment] Agreement [plaintiff's Exhibit 5] between the parties and under U.C.A. Section 78-27-56. Given the circumstances of this case, the Court finds that Plaintiff is also entitled to an award of punitive damages." (R. 2929). An evidentiary hearing on the amount of attorney's fees, costs, and punitive damages to be awarded was held. R. 3353. A Supplemental Judgment (R. 3336) was entered awarding plaintiff: (i) attorney's fees of $164,461.25 together with prejudgment interest; (ii) punitive damages of $34,000.00; and (iii) cost of $5,892.52. Defendant filed a Notice of Appeal (R. 3342) in conjunction with this appeal.

Facts Relevant to the Issues Presented for Review

The purchase/employment agreement contains the following paragraph 7.4 unconscionable forfeiture provision: "If the employment of Graham is terminated for any reason, he will immediately forfeit any unpaid portion of the remaining contingent deferred purchase price specified in Paragraph 2.2 above, plus he will no longer be entitled to any continuing salary, allowances, and bonuses."

On March 20, 2001 (R. 3347 at p. 1398, line 6 through 1402, line 3) a lumber inventory was taken by Steve Hawkes. He only inventoried raw lumber. No finished wall panels, cut lumber, or any other in-process materials were inventoried to be included in the sale, although there were several stacks of wall panels at the wall panel plant on March 20, 2001. R. 3347 at p. 1399, lines 8 through 17. According to defendant's testimony (R. 3350 at p. 1805, line 11 through 1806, line 18) he and Steve Hawkes

determined that all wall panels manufactured before April 1, 2001 would not be part of the sale, and according to Steve Hawkes' testimony (R. 3347 at p. 1431, line 9 through p. 1432, line 12) all wall panels which were not included as part of the sale could be sold by defendant for his own account.

Plaintiff did not entirely take over operation of the wall panel plant until April 1, 2001. R. 2377 at para. 17. On April 1, 2001 plaintiff assumed all of defendant's wall panel plant lease obligations and began paying rent to the landlord for the wall panel plant. Defendant's Exhibit 174. The wall panel plant continued to operate as normal between March 19, 2001 and April 1, 2001. R. 2377 at para. 18. Accordingly, plaintiff continued to buy wall panels from defendant during this time before April 1, 2001 (as late as March 23, 2001 for resale to Reliance Homes Ensign Park Lot 117– defendant's Exhibit 196) as did Hamlet Homes. Wall panels manufactured for Hamlet Homes before April 1, 2001 include (R. 3350 at p. 1798, line 9 through p. 1845, line 25) the following: (i) Kelvin Grove Lots 20 and 22; (ii) Muirfield Lot 443; (iii) Glen Eagles Lots 109 and 114; and (iv) Shetland Meadows Lots 36, 70, and 82. The wall panels for Kelvin Grove Lots 20 and 22 were manufactured by Dave Kerlin (R. 3349 at p. 1085, line 23 through p. 1088, line 4) while defendant was vacationing in Disneyland through March 19, 2001 (R. 3348 at p. 1752, line 7 through p. 1757, line 24; Defendant's Exhibits 195 and 228).

After visiting the wall panel plant Bill Quinn of International Profit Associates ("IPA") recommended to Dan Burton and Steve Hawkes that defendant be terminated. R. 3343 at p. 449, line 13 through p. 454, line 14. On August 8, 2001 IPA formalized (plaintiff's Exhibit 62) its recommendation that defendant be terminated to avoid paying

him his salary, guaranteed quarterly bonuses, and the Contingent Deferred Purchase Price.

During August 2001 plaintiff investigated various ways of having IPA's recommended termination of defendant appear to be "for cause", including claiming that defendant: (i) embezzled a $7,293 check (which Hamlet Homes paid him for the wall panels for Kelvin Grove Lots 20 and 22); (ii) caused a $7,000 inventory shortage; and (iii) obtained various unauthorized expense reimbursements. R. 155 at para. 11.

Plaintiff's $7,293 Hamlet Homes Check claim: Plaintiff's claimed ownership of the $7,293 Hamlet Homes check is based incorrectly on the related wall panels being manufactured after plaintiff purchased defendant's wall panel business and took over operation of defendant's wall panel plant. Plaintiff's witnesses Michael Tomer, Dan Burton, and Klay Clawson all testified that they did not know when these wall panels were manufactured. R. 3343 at p. 325; R. 3347 at p. 1377; Klay Clawson Deposition at pp. 262-264. Dave Kerlin (who supervised the actual manufacture of these wall panels) testified that although he couldn't remember the specific dates that these wall panels were manufactured, he did remember that they were manufactured under his supervision while defendant was vacationing at Disneyland. R. 3349 at pp. 1085-1087; R. 3349 at p. 1104. The evidence establishes that defendant vacationed in Disneyland through March 19, 2001. R. 3348 at pp. 1752 – 1757; Defendant's Exhibits 195 and 228. Dave Kerlin also testified that "These same panels set outside the rolled up doors at the shop for at least a month before being delivered." R. 3349 at pp. 1087-1088.

The circumstantial evidence presented and relied upon by plaintiff (much of which is summarized, somewhat incorrectly, in plaintiff's Exhibit 72) for the purpose of attempting to move the date for the manufacture of these wall panels forward past the plaintiff's claimed takeover of the wall plant incorrectly presupposed that these wall had not been manufactured before being formally ordered. Defendant testified that while he was vacationing in Disneyland Dave Kerlin was having significant problems with the Weir residence and as a result defendant had Dave Kerlin manufacture these wall panels "to keep the guys busy back at the shop". R. 3350 at p.1812. Dan Burton, Klay Clawson, Dave Goodsell and defendant all testified to this practice that defendant would manufacture wall before they were ordered in order to fill production time. R. 3349, at p. 1259; Klay Clawson Deposition at p. 253, lines 1 through 7; R. 3350, pp. 1050-1051; R. 3348, pp. 1759 - 1760. Defendant's Exhibits 221 and 222 provide documentary evidence of this practice.

Plaintiff's $2,148 Generator Rental claim: The renting of defendant's generator was done openly to benefit plaintiff by providing power for plaintiff's framers on otherwise powerless jobsites. Plaintiff collected from its customer the $2,148 generator rental fee in question and plaintiff opted not to have such $2,148 repaid.

Plaintiff routinely passed on to its customers a generator rental fee where plaintiff arranged for the required power at job sites. Shane Smith testified that the $2,148 generator rental fee in question was included in plaintiff's $53,793 proposal which he signed (after defendant's August 28, 2001 termination) on September 4, 2001 and was invoiced to plaintiff's customer on September 25, 2001. R. 3343 at p. 959, lines 8

through p. 960, line 9; R. 3343 at p. 951, line 6 through p. 952, line 10; Defendant's Exhibit 159A. Jason Current testified that although he offered to repay the $2,148 for the generator rental fee, plaintiff has never taken him up on such offer. R. 3343 at p. 429, lines 5 through 22.

Plaintiff's $7,517.59 Conversion of Personal Property claim: Plaintiff's argument that it purchased all tangible personal property used and/or located at the wall panel plant, whether or not "shown on a separate asset schedule", is in direct conflict with the purchase/employment agreement and the testimonies of Dan Burton, Steve Hawkes, Bob Burton, and defendant. Dan Burton testified that at the August 28, 2001 termination meeting he told defendant to immediately remove all of defendant's equipment from the wall panel plant. R. 3347 at p. 1372, lines 5 through 14. Dan Burton's notes confirm defendant's agreement to remove his equipment as directed by Dan Burton. Defendant's Exhibit 143; Plaintiff's Exhibit 38. Steve Hawkes testified that the following items which were not included on the "separate asset schedule" were not purchased, paid for, or expected to be kept by plaintiff: "Some gooseneck trailers, a pickup truck, a panel van, one of the two forklifts, a PC computer . . . golf clubs" – "several items like that". R3347 at 1401, line 14 through 1402, line 7. Steve Hawkes also testified that defendant "specifically excluded some personal items", including: "golf clubs . . . personal computer . . . two or three gooseneck trailers . . . Ford pick-up truck . . . some other equipment . . . a job van". R. 3343 at p. 436, line 23 through p. 437, line 15. Bob Burton testified that his handwritten reference to "[defendant's] truck and equipment" (defendant's Exhibit 173) relates to items to which "there was an understanding among

someone to exclude" and that such understanding was accepted by plaintiff as evidenced by plaintiff's April 25, 2001 Lease (defendant's Exhibit 181) of defendant's pick up truck and two gooseneck trailers. R. 3347 at p. 1481, line 13 through p. 1483, line 13. Defendant testified that everything to be purchased was to be included on the separate asset list of the purchase/employment agreement and that "if property was not on the asset list it was [defendant's]". R 3350, p. 1902, line 19 through p. 1903, line 11.

Plaintiff's $34,000 Punitive Damages claim: As set forth in plaintiff's Trial Brief (R. 2663: "[plaintiff] is entitled to recover compensatory and punitive damages for [defendant's] fraud") and opening statement (R. 3344 at p. 41, lines 5 and 6: "we would also seek punitive damages for fraud"), plaintiff's only claim for punitive damages relates to the fraud claim for which plaintiff' failed to establish a prima facie case. R. 3346 at p. 843, line 17 through p. 845, line 19; R. 2840. Additionally, the evidence does not support the Court's finding (R. 2959) that "[defendant] acted fraudulently, willfully, maliciously and with the intent to damage [plaintiff] or in reckless disregard for [plaintiff's] rights." To the contrary, defendant testified that he used his best efforts to ensure the success of plaintiff's wall panel business during and after his employment, including "during the Nauvoo job, right after [plaintiff] fired [defendant, he] went down to the shop several evenings to help Klay Clawson ensure that the Nauvoo project was going to be a success" R. 3348 at p. 1744, line 17 through p. 1745, line 22. Klay Clawson testified that "It was surprising [that defendant was still willing to help on the Nauvoo project even after being terminated by plaintiff] in the sense that he had been let go and he was still willing to

help out if we needed." Klay Clawson Deposition at p. 123, line 11 through p. 125, line 3.

Plaintiff's $164,461.25 Attorney's Fees claim: As stated in plaintiff's opening statement "There is not an attorney's fee clause" (R. 3344 at p. 38, line 5) and "As to attorney's fees, those would be in the Court's discretion, if the Court determines that the defense of the plaintiff's claims have been in bad faith" (R. 3344 at p. 41, lines 6 through 9). Paragraph 9 of the purchase/employment agreement provides indemnity protection from third-party claims, and, as stated in plaintiff's opening statement, "is not an attorney's fee clause".

Plaintiff's $5,892.52 Taxable Costs claim: Plaintiff's Memorandum of Costs and Disbursements (R. 2985-2987) was served on defendant before, rather than after, a judgment from which an appeal lies and therefore does not meet the mandatory cost-claiming requirements of Rule 54(d)(2), Utah Rules of Civil Procedure.

Defendant's $1,749.56 Final Paycheck claim: Rather than pay Plaintiff his last paycheck (which shows $1,749.56 of gross pay for work through his August 28, 2001 termination date) plaintiff has improperly retained same and applied it to amounts plaintiff claims are owed by defendant. Defendant's Exhibit 43.

Defendant's $9,619.57 Accrued Bonus claim: Plaintiff refuses to pay various amounts due to defendant under the purchase/employment agreement based on paragraphs 7.1 ("[defendant] is an employee at will . . . .") and 7.4 ("If the employment of [defendant] is terminated for any reason, he will immediately forfeit any unpaid portion of the contingent deferred purchase price . . . , plus he will no longer be entitled to

any continuing salary, allowances and bonuses.") Such refusal in improper since: (i) paragraph 7.4 is unconscionable and therefore unenforceable; (ii) plaintiff's termination of defendant in order to avoid paying these amounts is a violation of plaintiff's duty of good faith and fair dealing; and (iii) the paragraph 7.1 "at will" provisions do not apply where, as here, significant consideration of defendant's business (in addition to agreeing to be employed by plaintiff) has been provided by defendant.

Steve Hawkes testified that "[defendant] brought an up and running existing business with established clientele, expertise, equipment where it made it that we could immediately produce walls". R. 3349 at p. 1406, lines 2 through 7. Defendant testified that "[plaintiff got a functioning wall panel business that was growing rapidly. [Plaintiff] got know how to run a successful wall panel plant." R. 3348 at p. 1729, lines 16 through 21. Defendant testified at length (R. 3348 at p. 1729, line 16 through p. 1742, line 14) as to the business and related know how that was transferred to plaintiff in connection with the purchase of defendant's wall panel business.

In regard to defendant's value to plaintiff as an employee, Dan Burton testified that he never had any complaints at all about defendant's performance. R. 3347 at p. 1383, lines 21 through 23. Steve Hawkes testified that while defendant was employed by plaintiff as manager "for the most part things seemed to be running pretty well at the wall panel plant". R. 3347 at p. 1408, lines 7 through 11. Jeff Burton testified that he gave defendant "an A-plus as far as his production ability". R. 3346 at p. 903, lines 15 through 20.

Dan Burton testified that if plaintiff did not contend that defendant was fired for cause, plaintiff would have paid this accrued bonus (R. 3347 at p. 1311, line 25 through p. 1312, line 10).

Defendant's $255,260.27 Premium Compensation claim: The $70,000 excess portion of defendant's promised $120,000 per year compensation has been calculated (through April 20, 2005) to be $255,260.27. Defendant testified that he anticipated that "if I used my best efforts to run the panel plant that I would be treated and dealt with fairly, and that I would find [plaintiff's business] is a place that I could profitably retire from". R. 3350 at p. 1919, line 24 through p. 1921, line 14. In response to "Now when you entered the agreement, how long did you expect [defendant] to work for [plaintiff]?" Dan Burton testified "I didn't have a predetermined expectation of how long he would work for [plaintiff]. We were entering into what we hoped would be a long-term relationship." R. 3349 at p. 1388, line 17 through line 21. Plaintiff continues to run the wall panel business even today. Monthly wall panel plant revenues have grown significantly and steadily from $109, 323.91 (defendant's Exhibit 118) in April 2001 (the first month plaintiff owned the wall panel plant) to $198,748.53 (defendant's Exhibit 122) in August 2001 (the month defendant was terminated) to $343,261.30 in December 2003 (the last month evidence of monthly revenues were presented at trial). Steve Hawkes testified that plaintiff continued to expand the capacity of the wall panel business from two lines to four lines after defendant was terminated. R. 3347 at p. 1404, line 5 through p. 1405, line 8. Dan Burton testified that plaintiff has relocated the wall panel

plant twice, with the most recent relocation in 2003 providing the benefit of further expanded capacity. R. 3349 at p. 1222, line 3 through p. 1223, line 3.

Defendant's $441,399.41 50% of Pretax Profits claim: For the three years (2001 through 2003) that defendant was to share in 50% of the pretax profits, plaintiff did several things which improperly reduced such profits.

Joann Hall testified to the various components of the $377,041.67 (defendant's unreceived Exhibit 215) of inter company allocations contained in defendant's exhibits 212, 213, and 214 (R. 3348 at p. 1604, line 10 through p. 1619, line 1) confirming that these allocations reduced the wall panel plant's profits.

Joann Hall testified that the inter company marking up of inventory also reduced the wall panel plant's profits. R. 3348 at p. 1619, lines 2 through 5. Joann Hall testified from defendant's Exhibit 125 that the 2003 $1,581,125.70 cost of components portion of the cost of goods was the only inventory item which included inter company markups. R. 3348 at p. 1599, line 6 through p. 1600, line 8. Defendant's Exhibit 124 shows the 2002 cost of components portion of the cost of goods sold to be $1,566,611.34. Based on Steve Hawkes' testimony of these markups ranging from 10 to 12% (R.3347 at p. 1396, lines 4 through 16), the resultant reduction to the wall panel plant's profit before taxes for 2002 and 2003 would range from between $876,216.08 and $927,315.71.

Joann Hall testified that she reduced wall panel plant profits through a journal entry (defendant's Exhibit 130) that reduced inventory by $42,383.95. R. 3348 at p. 1565, line 3 through p. 1569, line 4. Although Joann Hall had been questioned many months earlier about this entry during her deposition, she still had no explanation for her

journal entry description of "WRITE UP SAVE FOR BACK CHARGES", except for her statement that: "I didn't know the error – if there was an error or there wasn't an error. I wanted to be conservative and back it all out until we had a more accurate number." R. 3348 at p. 1568, lines 4 through 25.

Defendant's $15,209.71 Hamlet Homes Jobs claim: Judge Laycock's Ruling of Motion for Partial Summary Judgment Undisputed Facts include the following: "17. According to the contract, plaintiff was supposed to take over operation of defendant's panelization plant on March 19, 2001. Plaintiff did not entirely take over operation of the panelization plant until April 1, 2001. 18. The panelization plant continued to operate as normal between March 19, 2001 and April 1, 2001. Defendant claims that the jobs performed by the panelization plant up until April 1, 2001 were performed for the benefit of [defendant's company] AHS. Plaintiff claims that the jobs performed by the plant from March 19, 2001 forward were performed for the benefit of plaintiff." R. 2377. Although Dan Burton testified that "[plaintiff] would have ceased doing business with Advanced Home Systems at the closing of our agreement" (R. 3347 at p. 1392, line 4 through line 8), defendant's Exhibit 196 shows plaintiff still ordering and receiving wall panels from Defendant on March 23, 2001. Defendant testified regarding defendant's Exhibit 196 that plaintiff was still buying wall panels from defendant "Because until the end of March I was still manufacturing panels for the benefit of Advanced Home Systems." R. 3350 at p. 1846, line 1 through p. 1853, line 12. Susan West testified that when she first came to the wall panel plant on March 26, 2001 there were some old wall

panels, some new wall panels, and some in-process wall panels. R. 3345 at p. 585, line 16 through p. 586, line 20.

Plaintiff's counsel effectively disrupted defendant's testimony regarding these jobs (see R. 3350 at p. 1798, line 9 through p. 1845, line 25), through: (i) objecting to admission of defendant's unreceived Exhibit 149, even though defendant's unreceived Exhibit 149 is the same as the trial exhibit plaintiff identified as plaintiff's unreceived Exhibit 54; (ii) misrepresentations; (iii) continual interruptions; and (iv) objections to the admission and use of defendant's unreceived Exhibit 230, even though plaintiff's counsel made extensive use of, and had admitted, the same type of evidence summaries (plaintiff's Exhibits 72 and 73) in the case. Plaintiff's counsel misrepresented to the trial court that "He's talking about a white board that's erased daily" (R. 3350 at p. 1800 line 20 through line 22) in support of his repeated best evidence objection to any reference to the white boards which contained a significant amount of the information about the various jobs. Klay Clawson testified as follows regarding his use of the white boards: "I would check on the status of jobs and jobs that were done and, you know, they had this board out there that was kind of the control board of jobs that were pending, jobs that were done." Klay Clawson Deposition at p. 71, line 1 through line 10. Susan West testified as follows regarding the white boards: "The boards went in order. They would go down, and when the board was filled up, it would go to the top of the next board and go down. Then when that was filled up it would go to the next board. . . . There was . . . whether it had been delivered, whether it was supposed to be delivered, you know, things like that. Just a whole bunch of stuff all the way across for each job." R. 3345 at p. 587,

line 20 through p. 588, line 16. Plaintiff's best evidence objections to reference to the white boards was continually sustained, even in light of defendant's uncontroverted testimony that the white boards were removed between August 28, 2001 and October 28, 2001 when plaintiff had control of the wall panel plant, the locks were changed, and defendant was denied access to the wall panel plant. R. 3350 at p. 1800, line 20 through p. 1802, line 12.

The circumstantial evidence presented and relied upon by plaintiff (much of which is summarized, somewhat incorrectly, in plaintiff's Exhibit 73) for the purpose of attempting to move the date for the manufacture of these wall panels forward past the plaintiff's claimed takeover of the wall plant incorrectly presupposed (among other things) that lumber for these walls was ordered before, rather than after, these walls were manufactured. Defendant testified (as paraphrased by Judge Howard at R. 3350, p. 1819, line 25 through p. 1820, line 3) "that they would use lumber from their own inventory and then replenish with their ordered lumber from Anderson [Lumber]. So seemingly that invoice from Anderson [Lumber] would refer to this job, but it may not be the actual lumber used."

Defendant's $16,842 Conversion of Equipment claim: As set forth in section 1.1 of the purchase/employment agreement defendant sold to plaintiff "All assets shown on a separate asset schedule". Defendant testified that the items listed on plaintiff's Exhibit 29 were his, were never included on the asset schedule of the purchase/employment agreement, and were never purchased by plaintiff. R. 3350 at p. 1954, line 14 through p. 1960, line 2. Defendant testified that he also had his attorney Scott Walker talk with

plaintiff's attorney in an attempt to retrieve the remaining items of defendant's equipment. R. 3350 at p. 1909, line 21 through p. 1910, line 14; Defendant's Exhibit 169. Defendant testified that he valued these unretrieved items of equipment at $16,842.00. R. 3350 at p. 1901, line 15 through p. 1912, line 20; Defendant's Exhibit 170; Defendant's Exhibit 233.

Defendant's $40,000 Truck claim: Pursuant to section 7.2 of the purchase/employment agreement plaintiff leased a truck for defendant's use. The agreement provides that "If [defendant] quits his employment with [plaintiff], he shall have no right to continue the use of the truck and must surrender possession of the truck to [plaintiff] immediately." Additionally the agreement provides that "If [defendant] is fired without just cause, he shall be entitled to keep the truck and [plaintiff] will deliver title to the truck to him free and clear of all liens and/or encumbrances." Otherwise the agreement is silent as to the disposition of the truck. Dan Burton testified that plaintiff instructed the lessor to repossess the truck. R. 3347 at p. 1294, line 25 through p. 1295, line 19; Defendant's Exhibit 166. Defendant testified that since he didn't quit, plaintiff's repossession of the truck violated his contractual right to the continued use and possession of the truck. R. 3350 at p. 1892, line 2 through p. 1893, line 9; Defendant's Exhibit 166. Additionally, since defendant's termination was not for just cause plaintiff is contractually required to "deliver title to the truck to him free and clear of all liens and/or encumbrances".

Defendant's $41,415.22 Wall Panel Plant Lease Obligations claim: Although Bob Burton testified that plaintiff assumed all of defendant's obligations under the lease

(defendant's Exhibit 235) of the wall panel plant (R. 3347 at p. 1445, line 1 through p. 1447, line 18), Scott Walker testified (R. 3346 at p. 1010, line 1 through p. 1015, line 16) that plaintiff left the wall panel plant in disrepair. Defendant testified (R. 3350 at p. 1928, line 24 through p. 1937, line 11) that plaintiff's failure to satisfy these panel plant lease obligations caused damage to defendant totaling $41,415.22, which consists of the following items: (i) $700 for repair materials (R. 3350 at p. 1935, line 11 through line 17); (ii) $2,400 in repair labor (R. 3350 at p. 1935, line 11 through line 21); (iii) $20,463.48 for the rent defendant paid pending resolution of the suit by the landlord (R. 3350 at p. 1934, line 16 through line 25); (iv) $1,191.74 for real estate taxes (R. 3350 at p. 1935, lines 4 through 6); and (v) $16,660 for the favorable rent benefit still remaining on the lease (R. 3350 at p. 1931, line 17 through p. 1932, line 2). Plaintiff's objection to defendant's testimony about the rent paid was sustained.

Defendant's $573,343.27 Attorney's Fees claim: Defendant testified to a 40% contingent fee agreement in this matter (R. 3350 at p. 1940, line 4 through line 25; Defendant's Exhibit 239) and to additional legal fees (R. 3350 at p. 1932, line 5 through p. 1934, line 4; Defendant's Exhibit 236; R. 3350 at p. 1937, line 13 through p. 1940, line 3; Defendant's Exhibit 238), which total $573,343.27 through April 20, 2005.

Defendant's $16,756.64 Taxable Costs claim: Defendant testified to costs through April 20, 2005 of $16,756.64 (R. 3350 at p. 1938, line 1 through line 11; Defendant's Exhibit 238).

SUMMARY OF ARGUMENT

Defendant is the owner of the wall panels sold which resulted in Hamlet Homes issuing the $7,293.00 check to him.

The $2,148.00 payment to Jason Current for the rental of defendant's generator resulted from defendant using his best efforts for the benefit of plaintiff's wall panel business to insure that the necessary power was available to job. Plaintiff collected $2,148.00 from the customer and waived the right to any additional payment when it declined Jason Current's offer to return $2,148.

Plaintiff failed to establish entitlement to the $7,517.59 of personal property in question, that defendant interfered with such entitlement, and/or absence of defendant's lawful justification.

Plaintiff's only claim for punitive damages relates to plaintiff's fraud claim which was dismissed for failure to establish a prima facie case. The evidence does not support the trial court's finding that defendant acted fraudulently, willfully, maliciously and with the intent to damage plaintiff or in reckless disregard for plaintiff's rights. Additionally, any punitive damages over $1,000 would be excessive based on the Crookston factors.

The purchase/employment agreement contains no attorney's fee clause. The evidence does not support the trial court's finding that defendant's claims and defenses in this action are without merit and were asserted in bad faith. Additionally, plaintiff has not presented sufficient evidence to support any amount of attorney's fees.

Plaintiff's claim for costs, which was filed before (rather than after as required) a judgment from which an appeal lies, did not meet the mandatory requirements of Rule

54(d)(2), Utah Rules of Civil Procedure. Even if timely, only $160.00 of the $5,892.52 awarded costs are proper, since plaintiff has provided no evidence as to why any of these deposition costs were essential to the development and presentation of plaintiff's case.

Plaintiff has improperly used $1,451.43 of defendant's $1,749.56 final paycheck as an offset to plaintiff's claim to the $7,293.00 Hamlet Homes check.

Plaintiff improperly relies on the substantively unconscionable forfeiture provision included as paragraph 7.4 of the purchase/employment agreement to avoid paying defendant the remaining amounts due for his wall panel business.

The "at-will" provisions are unenforceable where (as here) defendant has provided significant consideration (his wall panel business) in addition to agreeing to be employed by plaintiff.

Plaintiff violated its duty of good faith and fair dealing by terminating defendant without good cause based on a cost-saving recommendation of International Profit Associates. Plaintiff terminated defendant to stop paying him for his wall panel business.

During the March 19, 2001 through April 1, 2001 transition (described by Judge Laycock as the "mutual breach of contract" period) the parties had defendant continue to manufacture wall panels for his own account as clearly illustrated by plaintiff still buying wall panels from defendant as late as March 23, 2001. The net amount still owed for such wall panels is $15,209.71.

Plaintiff purchased only the equipment from defendant that was listed on the Asset Schedule of the purchase/employment agreement, but kept additional items which belong to defendant and which are valued at $16,842.00.

Paragraph 7.2 of the purchase/employment agreement provides that "If [defendant] quits his employment with [plaintiff], he shall have no right to continue the use of the truck and must surrender possession of the truck to [plaintiff] immediately." Since defendant didn't quit, plaintiff had no right to deprive defendant of the agreed-to continued use and possession of the $40,000 truck.

Plaintiff assumed all of defendant's obligations under the lease as of April 1, 2001, but failed to satisfy those lease obligations, including (among others) the obligation to repair significant damage to the leased premises. As a result defendant has suffered significant economic loss totaling $41,415.22.

Defendant's attorney's fees (of $573,343.27) and costs (of $16,756.64) are recoverable as consequential damages as a result of plaintiff's wrongful termination of plaintiff. Likewise, defendant's attorney's fees are recoverable pursuant to Utah Code Section 78-27-56(1) where (as here) plaintiff's claims and defenses are meritless.

ARGUMENT

The Trial Court's Incorrect Ruling on Plaintiff's Claims

Plaintiff's $7,293.00 Hamlet Homes check claim: The legal theories plaintiff relies on are apparently conversion, unjust enrichment, breach of written contract, breach of oral contract and breach of fiduciary duties.

"Conversion requires 'an intent to exercise dominion or control over goods **inconsistent with the owner's rights**.'" Alta Industries, Ltd. v. Hurst, 846 P.2d 1282, 1290, footnote 18 (Utah 1993) (citing Allred v. Hinkley, 328, P.2d 726, 728 (Utah 1958)) (emphasis added). In this case the owner of the wall panels sold and the resultant $7,293.00 Hamlet Home check was defendant.

"In order to prevail on a claim for unjust enrichment, three elements must be met. First, there must be a benefit conferred on one person by another. Second, the conferee must appreciate or have knowledge of the benefit. Finally, there must be 'the acceptance or retention by the conferee of the benefit **under such circumstances as to make it inequitable for the conferee to retain the benefit** without payment of its value.' The plaintiff must prove these three elements to sustain a claim for unjust enrichment." Desert Miriah, Inc. v. B&L Auto, Inc., 12 P.3d 580, 582 (Utah 2000) (citation omitted) (emphasis added). In this case the owner of the wall panels sold and the resultant $7,293.00 Hamlet Home check was defendant.

Pursuant to paragraphs 1.9 and 4.5 of the purchase/employment agreement defendant continued running his business as done previously (including producing the

wall panels which resulted in his receiving the $7,293.00 Hamlet Home check) up until the closing and transfer of the business to plaintiff.

Plaintiff's oral contract breach claim is based on Dan Burton's self-serving and controverted statement contained in plaintiff's Exhibit 39 that at the August 28, 2001 termination meeting "[defendant] acknowledged that he did owe the [$7,293.00] to [plaintiff], that he had cashed the check, but that he couldn't pay us right now, but he would pay [plaintiff] on Friday, August 31, 2001." Paragraph 10.3 of the purchase/employment agreement, however, specifically precludes such oral modification.

Defendant's fiduciary duties to plaintiff as manager of the wall panel plant did not arise (if ever) until defendant was employed by plaintiff as such. Since the wall panels which resulted in defendant receiving the $7,293.00 Hamlet Home check were produced prior to such employment, defendant owed no such fiduciary duty.

Plaintiff's $2,148.00 Generator Rental claim: The legal theory plaintiff relies on is apparently breach of fiduciary duties.

Section 13, Restatement of the Law, Second, Agency (1958) describes the fiduciary duties of an agent "to act primarily for the benefit" of the principal including the following duties: (i) "to account for profits arising out of the employment"; (ii) "not to act as, or on account of, an adverse party without the principal's consent"; (iii) "not to compete with the principal on his own account or for another in matters relating to the subject matter of the agency"; and (iv) "to deal fairly with the principal in all transactions between them".

Consistent with defendant's duty "to act primarily for the benefit" of plaintiff while employed by plaintiff, paragraph 7.3 of the purchase/employment agreement requires that "[defendant] shall use his best efforts to insure the success of [plaintiff's] Panelization Division". As manager of plaintiff's wall panel plant defendant saw to it that power was available on job sites as required for the framers to be able to use plaintiff's wall panels. There was nothing secret about the renting of defendant's generator. Plaintiff collected from its customer the $2,148 generator rental fee in question. Defendant was paid no more than what was collected from plaintiff's customer for the rental of defendant's generator. This $2,148 generator rental charge was included as a specific line item in the bidding process and was included in the amount invoiced to plaintiff's customer.

Additionally, even if plaintiff had any right for the return of the $2,148 (which it did not), plaintiff waived any such right by declining Jason Current's offer to return the $2,148 in question. "'A waiver is the intentional relinquishment of a known right. To constitute waiver there must be an existing right, benefit or advantage, a knowledge of its existence, and an intention to relinquish it.'" Geisdorf v. Doughty, 972 P.2d 67, 72 (Utah 1998).

Plaintiff's $7,517.59 Conversion of Personal Property claim: The legal theory plaintiff relies on is apparently conversion and (as to "Truck Lease Expense") breach of oral contract.

"A conversion is an act of **willful interference** with a chattel, done **without lawful justification** by which **the person entitled thereto is deprived of its use and possession**." Allred v. Hinkley, 328 P.2d 726, 728 (Utah 1958). (emphasis added).

As to conversion, plaintiff has failed to establish plaintiff's entitlement to the items in question, that defendant interfered with such entitlement, and/or absence of defendant's lawful justification.

The oral contract is again based on Dan Burton's self-serving and controverted statement contained in plaintiff's Exhibit 39 that at the August 28, 2001 termination meeting plaintiff "told [defendant] that we would let him drive home, but wanted him to turn the truck in . . . [defendant] said he would do this". Paragraph 10.3 of the purchase/employment agreement, however, specifically precludes such oral modification.

The Trial Court's Incorrect Awarding of Punitive Damages, Attorney's Fees, and Costs

Plaintiff's $34,000.00 Punitive Damages award: As set forth in plaintiff's trial brief (R. 2663) and opening statement (R. 3344 at p. 41, lines 5 and 6), the only claim for punitive damages relates to plaintiff's fraud claim which was dismissed for plaintiff's failure to establish a prima facie case for fraud. R. 3346 at p. 843, line 17 through p. 845, line 19; R. 2840. As illustrated throughout this brief, the evidence presented at trial does not support the trial court's finding (R. 2959) that "[defendant] acted fraudulently, willfully, maliciously and with the intent to damage [plaintiff] or in reckless disregard for [plaintiff's] rights." Additionally, any punitive damages award over $1,000 would be excessive based on the Crookston factors. R. 3290-3297.

Under Utah law the [Crookston v. Fire Insurance Exchange, 817 P.2d 789 (Utah 1991)] factors "must be considered in assessing the amount of punitives to be awarded". Id. at 808.

Defendant's net worth is $7,000. R. 3353 at p. 139, lines 5 through p. 140, line. In VanDyke v. Mountain Coin Distributors, Inc., 758 P.2d 962, 966 (Utah App. 1988), where the defendant's conduct was found to be "motivated by vindictiveness and ill will", the Utah Court of Appeals reduced the punitive damage award from $37,500 [7% of defendant's net worth] to $12,500 [2.3% of defendant's net worth].

The nature of alleged misconduct and the facts and circumstances surrounding such misconduct which can be summarized as follows were not, as in VanDyke, supra, "motivated by vindictiveness and ill will":

- Defendant cashed a check in the amount of $7,293 which was made out to his company Advanced Home Systems for wall panels which were manufactured before plaintiff took over the wall panel plant and which Klay Clawson said were defendant's and not plaintiff's (see: plaintiff's Exhibit 25; R. 3349 at p. 1083, line 15 through p. 1088, line 4; R. 3348 at p. 1751, line 20 through p. 1757, line24; defendant's Exhibits 195 and 228; R. 3350 at p. 1811, lines 13 through p. 1813, line 15; and (f) defendant's Exhibit 229 and R. 3348 at p. 1767, lines 16 through p. 1781, line 14);
- Defendant provided power to a jobsite in the form of his generator as requested by a customer and for which he was paid $2,148 by plaintiff and for which plaintiff was

paid $2,148 by the customer (see: defendant's Exhibit 159 and R. 3346 at p. 958, line 21 through p. 968, line 19);

- Defendant kept (until it was repossessed under the direction of plaintiff) a truck which defendant had received from plaintiff as an employment signing bonus and which defendant's attorney advised him at the time of his termination (and confirmed to others subsequently) that he could keep in accordance with the terms of his employment agreement with plaintiff (see: R. 3350 at p. 1892, line 7 through p. 1893, line 9; and defendant's Exhibit 163A and R. 3346 at p. 999, line 10 through p. 1003, line 20);
- As directed by Dan Burton at the time of his termination, defendant arranged with Klay Clawson to pick up equipment he and Klay Clawson identified as belonging to defendant and (in the presence of Klay Clawson and with the assistance of defendant's attorney) picked up various of the identified equipment items (see: defendant's Exhibit 143 and R. 3347 at p. 1372, lines 5 through 14; R. 3350 at p. 1893, line 10 through p. 1895, line 10; and R. 3350 at p. 1909, lines 21 through 25).

Defendant's alleged misconduct had no effect on the lives of plaintiff or others: (i) there has been no effect on plaintiff's net revenues (R. 3353 at p. 150, lines 9 through 13); (ii) there has been no personal, economic effect on the owners (R. 3353 at p. 152, lines 16 through 19); (iii) there has been no impact on peoples' view of plaintiff's honesty or integrity (R. 3353 at p. 154, lines 11 through 21); and (iv) there has been no emotional or medical impact on the owners or anyone else at plaintiff (R. 3353 at p. 155, line 10 through p. 156, line 6).

There is little (if any) probability of future recurrence of defendant's alleged misconduct, since: (i) he will not be developing and then selling another business (R. 3353 at p. 143, lines 12 through 20); (ii) he will not be seeking to manage a division of a large company in the future (R. 3353 at p. 143, line 21 through p. 144, line 1); (iii) plaintiff has stipulated that there is no opportunity for recurrence of defendant's alleged misconduct at plaintiff's company (R. 3353 at p. 164, lines 13 through 14); and (iv) plaintiff will not recommend defendant for employment (see R. 3353 at p. 165, lines 4 through 9).

Defendant has never had any relationship with plaintiff (or any of its owners or employees) other than as a customer, a seller of a business, and as an employee. R. 3353 at p. 168, line 20 through p. 169, line 4.

The amount of actual damages in this case is $15,507. In Wilson v. Olroyd, 267 P.2d 759, (Utah 1954), the Supreme Court reduced the punitive damage award from $25,000 [50% of the compensatory damages] to $5,000 [10% of the compensatory damages].

Plaintiff's $164,461.25 Attorney's Fee award: As stated in plaintiff's opening statement "There is not an attorney's fee clause" (R. 3344 at p. 38, line 5). Paragraph 9 of the purchase/employment agreement only provides indemnity protection from third-party claims. The evidence does not support the trial court's finding (R. 2958) that "[defendant's] claims and defenses in this action are without merit and were asserted in bad faith." Plaintiff has not presented sufficient evidence to support **any amount** of an award of attorney's fees (R. 3303-3311) and has not allocated amounts between

successful and unsuccessful claims as required. Cottonwood Mall Co. v. Sine, 830 P.2d 266, 268-70 (Utah 1992); Valcarce v. Fitzgerald, 961 P.2d 305, 318 (Utah 1998).

Plaintiff's invoices which were included as Exhibit A (R. 2988-3061) to plaintiff counsel's November 16, 2005 Affidavit (R. 3062-3066) have insufficient detail for determining to which issues the claimed fees relate. See R. 3353 at p. 61, line 15 through p. 64, line 22; p. 91, lines 16 through 21; p. 111, line 4 through p. 114, line 12; and p. 117, line 19 through p. 120, line 13. Even where some detail as to what issues were being addressed is provided, plaintiff's invoices lump all of each individual's time together by day so that it is impossible even then to determine what portion of the hours billed that day related to what issues. See R. 3353 at p. 92, line 18 through p. 93, line16; and p. 99, line 19 through p. 100, line 8. Plaintiff has been unable and/or unwilling to provide any additional detail beyond the invoices, making it impossible to determine the proper allocation of the claimed fees. See R. 3353 at p. 101, lines 7 through 8; and p. 111, line 4 through p. 114, line 12.

Under Utah law, the required allocation to issues based on "success" deals with interim as well as ultimate success on the issues raised. See Cache County v. Beus, 128 P.3d 63 (Utah App. 2005) (fees charged for obtaining summary judgment which was later reversed were related to an unsuccessful issue and therefore unrecoverable); ProMax Development Corporation v. Raile, 998 P.2d 254 (Utah 2000) (award of attorneys' fees for successful appeal did not include fees incurred in pursuing the unsuccessful motion to dismiss the appeal). Plaintiff has failed to properly allocate the claimed fees between the successful and unsuccessful claims. For example: (i) none of the fees claimed for trial

time were allocated to the unsuccessful fraud claim (see R. 3353 at p. 33, lines 13 through 15); and (ii) none of the fees claimed for trial time were allocated to the unsuccessful improper expense reimbursement claim (see R. 3353 at p. 67, line 17 through p. 68, line 10; and R. 3353 at p. 70, lines 16 through 18). Plaintiff has also failed to properly allocate the claimed fees between the successful and unsuccessful motions. For example: (i) none of the claimed fees were allocated to plaintiff's unsuccessful opposition to defendant's motion to amend his answer and counterclaim (see R. 3353 at p. 76, line 21 through p. 78, line 14); and (ii) none of the claimed fees were allocated to the unsuccessful portions of plaintiff's Motion for Partial Summary Judgment (see R. 3353 at p. 38, lines 8 through 17; and p. 78, line 15 through p. 80, line 22). Even for the very few (less than 25 of over 1,000) hours plaintiff did allocated to plaintiff's unsuccessful claims, plaintiff arbitrarily reduced the claimed fees at a rate of $190 per hour, rather than the $200 per hour billed for these hours. See R. 3353 at p. 88, line 20 through p. 91, line 8.

Neither the affidavits submitted in support of the attorneys' fees claimed, nor the related testimony at the June 29, 2006 Evidentiary Hearing, were sufficiently detailed to show the reasonableness of the fees claimed, as required by Rule 73, Utah Rules of Civil Procedure. Likewise, although plaintiff claims attorney's fees under section 9 of the contract and pursuant to U.C.A. Section 78-27-56, plaintiff correlates none of the evidence to either of those claimed bases.

Although defendant requested discovery including "access to supporting documents such as attorney time records" [Cottonwood Mall Co. v. Sine, 830 P.2d 266,

268 (Utah 1992)], such request was denied at the December 8, 2005 Scheduling Conference based on plaintiff counsel's representation to the trial court that the supporting documents would contain no more information than contained on the invoices and that the eight individuals who billed time to this matter would remember no more than what was recorded on the invoices. See R. 3352 at p. 9, line 6 through p. 24, line 15. Rather than carry the burden of presenting evidence sufficient to support an award, plaintiff has chosen instead to leave it to the trial court to somehow allocate the time and related fees, even though plaintiff's counsel was unable to tell the trial court what hours were spent on what issues from his own review of his firm's invoices (which were provided as the sole documentary evidence[1] in support of the $163,434 of claimed attorneys' fees). See R. 3353 at p. 62, line 11 through p. 64, line 22.

Plaintiff's unquestioning[2] authorization to expend $163,434 of attorneys' fees to recover $15,507 of the $34,387 claimed by plaintiff at trial in this case is clearly unreasonable. "Several practical factors to consider in determining a reasonable attorney fee are the difficulty of the litigation, the efficiency of the attorneys in presenting the case, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality for similar services, the amount involved in the case and the result

---

[1] At the June 29, 2006 Evidentiary Hearing defendant objected to the admission of plaintiff's counsel's November 16, 2005 Affidavit and the exhibit to same containing these invoices as not being the "best evidence", as not being based on personal knowledge, and as being biased. Although the trial court overruled the objection, plaintiff chose not to submit the Affidavit for admission in the June 29, 2006 Evidentiary Hearing. See R. 3353 at p. 21-22, line 11 through p. 22, line 11; and p. 10, line 18 through p. 14, line 1.

attained, and the expertise and experience of the attorneys involved." Regional Sales Agency, Inc. v. Reichert, 784 P.2d 1210, 1215 (Utah 1989). (citations omitted).

Plaintiff counsel's testimony in support of his allocation to the unsuccessful issues of less than 25 hours [$4,543 of the invoiced amounts] compared to allocation to the successful issues of the more than 1,000 hours [$163,434 of the invoiced amounts] was self-serving and such allocation in this case is clearly unreasonable. "[T]he trial judge was not necessarily compelled to accept . . . self-interested testimony whole cloth . . . ." Beckstrom v. Beckstrom, 578 P.2d 520, 523-24 (Utah 1978). (citations omitted). "Undoubtedly, if a witness can be disbelieved entirely because of self-interest, a fortiori, he can be disbelieved in part, or his testimony discounted to any reasonable extent." Arnold Machinery Company v. Intrusion Prepakt Inc., 357 P.2d 496, 497 (Utah 1960).

Plaintiff has had sufficient opportunity to correctly allocate the claimed fees, but has failed to do so. Accordingly, plaintiff's claim for attorneys' fees should have been denied and no attorneys' fees should have been awarded to plaintiff. See Jensen v. Sawyer, 130 P.3d 325, 349-50 (Utah 2005) (affirming denial of fees where attorney "did not give [the court] sufficient evidence to determine how much time he spent on compensable claims and because the amount of time he claimed to have spent on compensable claims is unreasonable"); Keith Jorgensen's, Inc. v. Ogden City Mall Company, 26 P.3d 872 (Utah App. 2001) (affirming denial of fees where supporting affidavit accompanied by invoices failed to properly allocate claimed fees); A.K.& R. Whipple Plumbing and Heating v. Aspen Construction, 977 P.2d 518, 526 (Utah App.

---

[2] See R. 3353 at p 159, lines 3 through 7; and lines 22 through 24.

1999) (reversing and remanding where the trial awarded fees while acknowledging that it "had difficulty, based on [the] attorney fee affidavit, in separating the amount of time involved with [matters subject to a fee award] as opposed to the amount of time spent on other matters". "The Utah Supreme Court has required a party seeking attorney fees to allocate its request for fees according to its underlying claim."); Commerce Financial v. Hucks, 806 P.2d 200, 204 (Utah App. 1990) ("this failure . . . to apportion its fees would alone be sufficient basis for the court's denial of [the] request for attorney fees"); Utah Farm Production Credit Association v. Cox, 627 P.2d 62, 66 (Utah 1981) (affirming denial of attorneys' fees: "Because plaintiff failed in its proof, the court was left without a means to determine the portion of plaintiff's fees spent in prosecuting it complaint [where an award was available] and the portion spent in defending the counterclaim [where an award was unavailable]. Based on the evidence presented, we are not convinced that the trial court abused its discretion in [denying attorneys' fees].").

Plaintiff's $5,892.52 Costs award: Plaintiff's November 11, 2005 Memorandum of Costs and Disbursements (R. 2985-2987) was served on defendant (R. 2985) **before**, rather than **after**, a judgment from which an appeal lies and therefore does not meet the mandatory requirement of Rule 54(d)(2), Utah Rules of Civil Procedure, as to how plaintiff's costs must be claimed.

Judge Howard's Ruling Re: Plaintiff's Cost and Disbursements (R. 3314-3320) includes $4,405.10 for copies of deposition transcripts of plaintiff's own agents/employees' and $1,120.74 for copies of deposition transcripts of defendant's deposition which are not taxable as costs, since plaintiff has not presented any evidence

that copies of these transcripts were essential to the development and presentation of plaintiff's case. See Young v. State of Utah, 16 P.3d 549, 552-53 (Utah 2000).

The Trial Court's Incorrect Denial of Defendant's Claims

Defendant's $1,749.56 Final Paycheck claim: Rather than pay Plaintiff his last paycheck (which shows $1,749.56 of gross pay for work through his August 28, 2001 termination date) plaintiff has improperly retained same and applied $1,451.43 of it to amounts plaintiff claims are owed by defendant. Defendant's Exhibit 165.

Defendant's $9,619.57 Accrued Bonus claim: Plaintiff's refusal to pay various amounts due to defendant under the purchase/employment agreement is improper since: (i) the paragraph 7.4 forfeiture provision is unconscionable and therefore unenforceable; (ii) plaintiff's termination of defendant in order to avoid paying these amounts is a violation of plaintiff's duty of good faith and fair dealing; and (iii) such "at will" provisions as paragraph 7.1 do not apply where, as here, significant consideration (in addition to agreeing to be employed by plaintiff) has been provided by defendant.

In Resource Mangement Company v. Westin Ranch and Livestock Company Inc., 706 P.2d 1028 (Utah 1985) the Utah Supreme Court describes the limited applicability of the "general principle" that the courts will not relieve a party from the effects of a bargain that the party has made. Unconscionability is described as an "established exception" to this general principle. Id. at 1040.

The Utah Supreme Court has described the law on unconscionability as follows: "Gross disparity in terms, absent evidence of procedural unconscionability, can support a finding of unconscionability." Sosa v. Paulos, 924 P.2d 357, 361 (Utah 1996). "The

arguments for and against substantive unconscionability focus on the contents of the agreement, examining the relative fairness of the obligations assumed. When determining whether a contract is substantively unconscionable, we have considered whether its terms are so one sided as to oppress or unfairly surprise an innocent party or whether there exists an overall imbalance by the obligations and rights imposed by the bargain. The terms of the contract should be considered according to the mores and business practices of the time and place." Id. (citations and quotation marks omitted).

The covenant of good faith and fair dealing requires that the actions taken by plaintiff in carrying out the purchase/employment agreement be neither in bad faith nor unfair to defendant. An example of such bad faith and unfairness in this case is set forth by Judge Laycock where she states that, if the trial court finds that defendant "was terminated for the sole purpose of avoiding payment under the contingent deferred purchase payment clause of the contract" he "would be entitled to receive payment". R. 2367.

The Utah Supreme Court has described the covenant of good faith and fair dealing as follows: "Under the covenant of good faith and fair dealing, each party promises not to intentionally or purposefully do anything which will destroy or injure the other party's right to receive the fruits of a contract." Rawson v. Conover, 20 P.3d 876, 885 (Utah 2001). (citations and quotation marks omitted). In Dubois v. Grand Central, 872 P.2d 1073 (Utah App. 1994), the Court addresses the "tension" between situations regarding: (i) the potential danger of the covenant of good faith imposing independent rights or duties not provided for in the contract; and (ii) the potential danger of the employee being

deprived of rights under the contract (other than the employment status itself) based on the "at-will" employment status. Id. at 1078-79.

Utah recognizes common law exceptions to "at-will" employment contracts. Gilmore v. Salt Lake Area Community Action Program, 775 P.2d 940, 942 (Utah App. 1989). The "at-will" provisions in the purchase/employment agreement are subject to modification and removal from the "at-will" category where, as here, consideration of defendant's business (in addition to the services to be rendered as an employee) is provided by the employee which benefits the employer. Rose v. Allied Development Company, 719 P.2d 83, 86 (Utah 1986).

"Broadly speaking, the more leeway a party has under the terms of a contract, the more contracting parties may invoke the protections of the covenant of good faith and fair dealing in the exercise of that discretion." Eggett v. Wasatch Energy Corporation, 94 P.3d 193, 198 (Utah 2004).

A party claiming violation of the covenant of good faith and fair dealing is to be given leeway as to the admissibility of evidence to establish such claim:

> . . . although Eggett's evidence of book value might be extrinsic and inadmissible to vary the terms of the Shareholder Agreement, it is nevertheless admissible to prove Eggett's breach of covenant claim.

Id.

In violation of the covenant of good faith and fair dealing in this case, plaintiff intentionally and purposefully: (i) terminated defendant's employment; and (ii) prevented

defendant from effectively competing[3] with plaintiff – both in order to destroy and/or injure defendant's right to receive the fruits of his contract from the sale of defendant's wall panel business to plaintiff.

Plaintiff terminated defendant's employment based on a recommendation from International Profit Associates ("IPA"), which was formalized August 8, 2001 (defendant's Exhibit 138). Steve Hawkes testified (R. 3345 at p. 518, lines 1 through 15) of IPA's recommendation to terminate defendant's employment.

Dan Burton and Steve Hawkes testified (R. 3347 at p. 1383, lines 21 through 23; and p. 1408, lines 7 through11) that they had no complaints about defendant's job performance. Jeff Burton testified (R. 3346 at p. 903, lines 15 through 20) that he gave defendant "an A-plus as far as his production ability".

In an affidavit prepared in the course of this litigation, Dan Burton described (R. 155 at para. 11) his stated three bases for the decision to terminate defendant as follows:

> The only reason I decided to terminate [defendant] Graham was his dishonesty in embezzling [the $7,293 Hamlet Homes check] from [plaintiff] Burton Lumber and submitting false expense vouchers and his inability to explain the $7,000 inventory shortage.

Plaintiff's purported "investigation" of these three bases make it clear that each is trumped up and without merit. As discussed above, the $7,293 Hamlet Homes check was

---

[3] Although the parties were unable to agree (R. 3350 at p. 1916, line 14 through p. 1919, line 23) on any non-compete provision in the purchase/employment agreement, plaintiff unfairly obtained for itself the un-bargained-for benefit and improperly prevented defendant from effectively competing after termination of his employment by improperly depriving him of his truck, his equipment, his leased panel plant, and his final pay. Also, by filing this civil action and having a criminal complaint filed, plaintiff effectively

for wall panels manufactured before the closing of the purchase and thus belonged to defendant. Dan Burton testified that he had no direct knowledge of when these wall panels were manufactured and could not recall ever asking anyone when they were manufactured. R. 3347 at p. 1375, line 15 through p. 1379, line 12. All of the expense reimbursements in question were for legitimate business expenses. "The preponderance of the evidence demonstrates that Defendant timely and properly submitted these expenses to plaintiff, and following regular procedures of submission and review, Plaintiff approved the expenses." R.2835. At trial Dan Burton directly contradicted his affidavit (R. 155 at para. 11) when he provided the following testimony (R. 3347 at p. 1374, line 12 through p. 1375, line 9) regarding the $7,000 inventory shortage: "The inventory shortage did not weigh in on the decision to terminate [defendant] Michael Graham." Klay Clawson testified in his April 7, 2003 Deposition (page 144, lines 14 through 24) that he had no knowledge of whether or not defendant caused the $7,000 inventory shortage. In fact, the $7,000 inventory shortage was never booked and was such a small shrinkage compared to sales that it would have qualified the responsible manager for a bonus under plaintiff's Profit Participation Program (defendant's Exhibit 153).

The timing and extent of the so-called "investigation" of defendant, which Dan Burton directed to be conducted, makes it clear that Dan Burton knew at the time that his three stated bases for terminating Michael Graham were trumped up and without merit.

---

diverted defendant's time and financial resources, thus improperly preventing him from effectively competing with plaintiff.

For example, at trial Dan Burton testified (R. 3349 at p. 1224, line 14 through p. 1247, line 16) as to: (i) his being caught in a lie during his 30(b)(6) deposition testimony about whether or not he or anyone other than defendant approved defendant's expense reimbursements; and (ii) the fact that he was still approving defendant's expense reimbursements at the same time the purported "investigation" was taking place.

As another example, the formal IPA Recommendation (defendant's Exhibit 138), which is dated August 8, 2001, states that "Klay would approach Dave after hours today to go over this matter." Klay Clawson, however, testified in his Deposition at page 216 (lines 12 through 21) that he did not even take the physical inventory until the night of August 8, 2001. See physical inventory count dated August 8, 2001 (defendant's Exhibit 152). The so-called "investigation" was simply a set-up and had nothing to do with the decision to terminate defendant's employment and thus improperly prevent him from receiving the fruits of his contract with plaintiff – payment as agreed for defendant's wall panel business.

Defendant's $255,260.27 Premium Compensation claim: By terminating defendant, plaintiff also violated the covenant of good faith and fair dealing by intentionally and purposefully depriving defendant of the fruits of his contract – payment as agreed for defendant's wall panel business – in the form of the promised annual compensation in excess of "fair compensation". Defendant's $120,000 annual compensation included a $70,000 per year premium over the "fair compensation" of $50,000 per year as determined by plaintiff's expert witness. See defendant's Exhibit 202 at page 5.

Defendant's $441,399.41 50% of Pretax Profits claim: Although defendant was to share in 50% of the pretax profits, plaintiff did several things which improperly reduced such profits.

As a result of plaintiff's contract breach, including its violation of the covenant of good faith and fair dealing, defendant has suffered substantial economic injury.

> Under Utah law, damages available for a breach of contract may include not only general contract damages, but because the goal is to place the aggrieved party in the same economic position he would have had if the contract had been performed, the party may also seek redress through consequential damages.

Kraatz v. Heritage Imports, 71 P.3d 188, 200 (Utah App. 2003). (citations and quotation marks omitted).

The appropriate damages in this case are those required to restore defendant to the same economic position as if plaintiff had fully performed and defendant would have received the full fruits of the purchase/employment agreement.

In addition to improperly terminating defendant, plaintiff failed to replace him with a manager experienced in the manufacture of wall panels. As a direct result in 2002 Burton Lumber lost $98,240 (defendant's received then unreceived Exhibit 135B) on the Mammoth California job, rather than making between $300,000 and $400,000 as projected. See: defendant's Exhibit 136 (B06088); and April 3, 2003 Deposition of Klay Clawson at page 160, line 7 through page 161, line 5; and at page 231, line 2 through line 23.

As a direct result of the loss on the Mammoth, California project and JoAnn Hall's related May 30, 2002 arbitrary reduction of wall plant inventory by $42,384 (see

defendant's Exhibit 130), plaintiff failed to meet its own 2002 projected pretax profit. For 2002 plaintiff projected pretax profits of $482,973 (based on a projected gross profit margin of 25.69%) for the wall division, but reported instead a pretax loss of $49,391 (based on a reported gross profit margin of 20.13%). See defendant's Exhibit 124 (B06128)).

Had plaintiff replaced defendant with a manager experienced in the manufacture of wall panels and thus competent to succeed on the Mammoth California project, and had JoAnn Hall not have arbitrarily reduced inventory, plaintiff would have surpassed (defendant's unreceived Exhibit 211) its own 2002 projected pretax profits of $482,973:

Reported 2002 Pretax Loss	($ 49,391)
Plus:	
Reversal of Arbitrary 5/30/02 Inventory Reduction	$ 42,384
Reversal of Mammoth California Back Charges	$ 98,240
Projected Gross Profit on Mammoth California	$400,000
Adjusted 2002 Pretax Profit	$491,233

In 2003 plaintiff deprived defendant of the fruits of his contract – payment as agreed for defendant's wall panel business – in the form of 50% of the 2003 pretax profits by (among other things) failing to meet its 2003 projected pretax profits of $691,553 (based on a projected gross profit margin of 26.50%). See defendant's Exhibit 128 (B06518 and B06519). Instead, defendant reported a pretax loss of $227,571 (based on a reported gross profit margin of 14.34%).

JoAnn Hall testified (R. 3348 at p. 1604, line 10 through p. 1619, line 1) as to 2001, 2002, and 2003 wall panel plant pre-tax profits being reduced by $377,041.67

(defendant's unreceived Exhibit 215) as a result of inter company allocations of corporate expenses to the wall panel plant. She also testified (R. 3348 at p. 1619, lines 2-5) that inter company marking up of inventory reduced such pre-tax profits. Steve Hawkes testified (R. 3347 at p. 1396, lines 4 through 16) that such markups to the wall panel plant ranged from 10-12%. JoAnn Hall testified (R. 3348 at p. 1599, line 6 through p. 1600, line 8) that the markup was on the item described in the financial statements as cost of component. Accordingly, the incremental pretax profit reduction for 2002 and 2003 alone from marking up cost of components, which were $1,566,611.34 in 2002 (defendant's Exhibit 124 (B06129)) and $1,581,125.70 in 2003 (defendant's Exhibit 125 (B06241)), ranged $314,773.70 to $377,728.45.

Defendant's $15,209.71 Hamlet Homes Jobs claim: Judge Laycock's Ruling of Motion for Partial Summary Judgment Undisputed Facts include (R. 2377) the following: "17. According to the contract, plaintiff was supposed to take over operation of defendant's panelization plant on March 19, 2001. Plaintiff did not entirely take over operation of the panelization plant until April 1, 2001. 18. The panelization plant continued to operate as normal between March 19, 2001 and April 1, 2001. Defendant claims that the jobs performed by the panelization plant up until April 1, 2001 were performed for the benefit of [defendant's company] AHS. Plaintiff claims that the jobs performed by the plant from March 19, 2001 forward were performed for the benefit of plaintiff." R. 2377.

Defendant testified (R. 3350 at p. 1848, line 14 through p. 1849, line 1) that "until the end of March [2001] I was producing walls for the benefit of [defendant's company]

Advanced Home Systems". Steve Hawkes testified (R. 3347 at p. 1399, lines 8 through 17) that only uncut, dimension lumber was inventoried at the time of the purchase of defendant's wall panel plant and that no in-process or finished wall panels were included in the purchase.

In her January 12, 2004 Ruling on Motion for Summary Judgment, Judge Laycock describes (R. 2372) as a "mutual breach of contract" this transition period when "The parties agree that plaintiff did not take control of [defendant's company] AHS until April 1, 2001, but the contract states that AHS should cease to exist as an independent business after the closing date . . . ." The fact that defendant was to continue to manufacture and sell wall panels for his own account during this transition "mutual breach of contract" period is clearly illustrated by defendant's Exhibit 196 which shows that plaintiff was itself still buying wall panels from defendant as late as March 23, 2001.

In addition to wall panels which gave rise to the $7,293.00 Hamlet Home check, there are six Hamlet Homes jobs for which wall panels were manufactured for the account of defendant before plaintiff took over the wall panel plant on April 1, 2001, but for which plaintiff received payment (see plaintiff's Exhibit 73). These six jobs each had buyer selection dates prior to April 1, 2001. See plaintiff's Exhibit 73.

Additional evidence of the manufacture of these wall panels prior to plaintiff taking over operation of the wall panel plant on April 1, 2001 is found throughout the record. See plaintiff's Exhibits 54 (unreceived), 55, 57, 59, 65, 69, 70, 71, 73; defendant's Exhibits 126, 149 (unreceived), 187, 193 (unreceived), 231 (unreceived), 232; and defendant's testimony (R. 3350 at p. 1798, line 9 through p. 1803, line 13).

Defendant's $16,842.00 Conversion of Equipment claim: As set forth in section 1.1 of the purchase/employment agreement defendant sold to plaintiff purchased equipment as listed on the Asset Schedule, including specifically: "All assets shown on a separate asset schedule".

Plaintiff purchased equipment from defendant as listed on the Asset Schedule (Plaintiff's Exhibit 5 (B00479)) for an agreed price of $54,175.00. Although plaintiff had neither purchased nor paid for 55 other items of equipment (see defendant's Exhibit 170) that were at the wall panel plant at the time of defendant's termination, plaintiff kept all but five of such 55 equipment items. Defendant has estimated the value of the equipment items which belong to defendant, but have been retained by plaintiff, to be $16,842.00. See plaintiff's Exhibit 63(14).

Steve Hawkes testified (R. 3343 at p. 436, line 23 through p. 437, line 15; R. 3347 at p. 1401, line 14 through p. 1402, line 7) that several items of defendant's equipment which were not included on the Asset Schedule were not purchased, paid for, or expected to be kept by plaintiff. Dan Burton testified (R. 3347 at p. 1372, lines 5 through 14) that he told defendant at the August 28, 2001 termination meeting to remove all of defendant's equipment from the wall panel plant. Bob Burton testified (R. 3347 at p. 1481, line 13 through p. 1483, line 13) that "there was an understanding among someone to exclude" defendant's "truck and equipment" from the purchase. In fact, on April 25, 2001 plaintiff entered into a written lease (defendant's Exhibit 181) with defendant to lease some of defendant's equipment which was not included in the Asset Schedule.

Defendant's $40,000.00 Truck claim: Since defendant didn't quit, under paragraph 7.2 of the purchase/employment agreement plaintiff had no right to deprive defendant of the continued use and possession of the truck.

Defendant's $41,415.22 Lease Obligations claim: Plaintiff assumed all of defendant's obligations under the lease, but failed to satisfy those lease obligations, including (among others) the obligation to repair significant damage (defendant's Exhibit 235) to the leased premises.

Plaintiff has formally by affidavit taken the position (R. 1034 at para. 4) during this litigation that that "[Plaintiff] agreed to and did in fact assume all of [defendant's] obligations under his lease with the landlord".

Defendant testified (R. 3350 at p. 1928, line 24 through p. 1937, line 11) that as a result of plaintiff's failure to fulfill these assumed lease obligations, defendant has suffered significant economic loss. Since defendant was unable to afford the repair costs (estimated in the civil suit (defendant's Exhibit 234) filed against defendant by the landlord to be approximately $75,000.00), defendant continued to rent the wall panel plant through October 31, 2002, until he was finally able to reach a compromise with the landlord. Pursuant to such compromise, the favorable lease was terminated fourteen month early and defendant contributed approximately 80 hours of labor (valued by defendant at $30.00 per hour for a total of $2,400.00) to repair and clean up and approximately $700.00 of sheet metal materials for repair of the panel plant walls.

In addition to the $2,400.00 of labor and the $700.00 of sheet metal materials, defendant incurred rent payments of $20,463.48 ($1,705.29 per month for 12 months)

and the 2001 real estate tax escalation of $1,191.74. During this 12-month period defendant gained no benefit from the availability of the leased premises, since plaintiff had improperly deprived him of his truck, his equipment, his final pay, and had diverted his time and financial resources to improperly prevent him from effectively competing with plaintiff in the wall panel business.

At the time plaintiff took over the lease defendant also had $16,660.00 remaining of unamortized consideration which he had paid when he assumed the lease on September 22, 1999. See defendant's Exhibits 183 (unreceived) (G07561) and 103.

Defendant's $573,343.27 Attorney's Fee claim: Defendant has properly pled and proved his claim for attorney's fees. Sears v. Riemersma, 655 P.2d 1105, 1110 (Utah 1982).

In his Counterclaim (R. 201) defendant has pled in his prayer for (among others) "an award of costs [and] attorney's fees". In his Fourteenth Defense (R. 702) defendant has also pled "to recover all costs and attorneys' fees incurred by [him] in the defense of the Amended Complaint".

Defendant has incurred attorney's fees of $3,500 (defendant's Exhibit 236) and $2,500 (defendant's Exhibit 237) in defending the suit by the landlord and the criminal complaint, respectively. Under Utah law, attorney's fees are recoverable as consequential damages where (as here) "[the breaching party's] breach of contract foreseeably caused the [non-breaching party] to incur attorney fees through litigation with a third party". Collier v. Heinz, 827 P.2d 982, 983 (Utah 1992).

To date defendant has also incurred attorney's fees and costs in defending and prosecuting this case, including attorney's fees of $4,205 (defendant's Exhibit 236) to prior counsel; costs to date of $16,453.32 (defendant's Exhibit 238); and attorney's fees of $1,000.00 plus a 40% contingent fee (defendant's Exhibits 238 and 239) to current counsel. Under Utah law the attorney's fees in this case are also recoverable by defendant as consequential damages:

> **The rationale for allowing attorney fees as recoverable damages within the contemplation of the parties** in first-party insurance claims **is also applicable to employment claims**. Terminated employees, like injured insurance claimants, find themselves in a particularly vulnerable position once the employer breaches the employment agreement. **Employers can reasonably foresee that wrongfully terminated employees will be forced to file suit to enforce their employment contracts and will foreseeably incur attorney fees.** Under our holdings in Berube and Beck, therefore, the trial court erred in refusing to instruct the jury on **the availability of consequential damages, including attorney fees, in [the terminated employee's] employment suit.**

Helsop v. Bank of Utah, 839 P.2d 828, 840-41 (Utah 1992). (emphasis added).

> Under Utah law, damages available for a breach of contract may include not only general contract damages, but because the goal is to "place the aggrieved party in the same economic position he would have had if the contract had been performed," the party may also seek redress through consequential damages. . . . "To recover consequential damages, a non-breaching party must prove (1) that consequential damages were caused by the contract breach; (2) that consequential damages ought to be allowed because they were foreseeable at the time the parties contracted; and (3) the amount of consequential damages within a reasonable certainty."

Kraatz v. Heritage Imports, 71 P.3d 188, 200 (Utah App. 2003). (citations omitted).

In this case plaintiff intentionally and purposefully terminated defendant's employment to trigger the paragraph 7.4 forfeiture provision of the purchase/employment agreement. In conjunction with such termination plaintiff also prevented defendant from

effectively competing with plaintiff after employment termination by depriving defendant of his truck, his equipment, his facility, and funds to pursue a competing wall panel business. In support of such deprivation plaintiff intentionally and purposefully sapped defendant of time and resources by filing the civil suit, causing a criminal action to be filed, abandoning the leased premises (two months after defendant's termination) in a state of disrepair, and withholding payments to defendant relating to various Hamlet Homes jobs, the third quarter bonus, and final paycheck.

Such breach of contract and violation of the covenant of good faith and fair dealing give rise to damages, including consequential damages in the form of attorney's fees and costs.

Additionally, reasonable attorney's fees and costs are also available to defendant, since plaintiff's claims and defenses are without merit[4]. Ault v. Holden, 44 P.3d 781, 793 (Utah 2002).

Defendant's $16,756.64 Costs claim: Following the Utah Supreme Court's Heslop rationale, costs are similarly available as foreseeable consequential damages where, as here, plaintiff has wrongfully terminated defendant.

[4] Arguably under Utah law the "bad faith" element of 78-27-56(1) "drops out" (see Lieber v. ITT Hartford Insurance Center, Inc., 15 P.3d 1030, (Utah 2000)) where, as here, the terminated employee finds himself "in a particularly vulnerable position once the

CONCLUSION

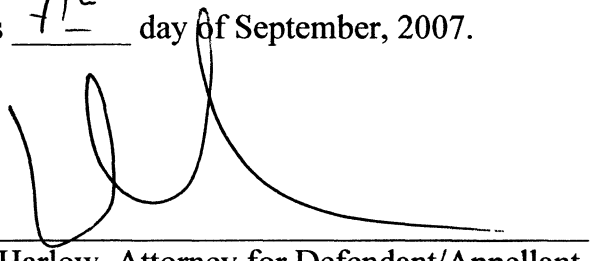
Based on the foregoing, defendant seeks reversal of the judgment in favor of plaintiff on plaintiff's first (conversion), second (unjust enrichment), fifth (breach of written contract), sixth (breach of oral contract), and seventh (breach of fiduciary duties) causes of action relating to the Hamlet Homes check claim (of $7,293.00 less defendant's last paycheck of $1,451.43 for a net of $5,841.57), the generator rental claim (of $2,148.00), and the conversion of plaintiff's personal property claim (of $7,517.59) and related interest. Defendant also seeks reversal of the award to plaintiff of punitive damages (of $34,000.00), attorney's fees (of $164,461.25 and related interest), and costs (of $5,892.52).

Based on the foregoing, defendant also seeks judgment against plaintiff on defendant's first (breach of contract), fourth (waste of premises), fifth (conversion of personal property), seventh (trespass to personal property), eighth (declaratory judgment), ninth (breach of contract), tenth (violation of duty of good faith and fair dealing), and eleventh (constructive trust) causes of action relating (through April 20, 2005) to defendant's final paycheck (of $1,749.56), accrued bonus (of $9,619.57), premium compensation (of $255,260.27), 50% of pretax profits (of $441,399.41), Hamlet Homes jobs (of $15,209.71) conversion of equipment (of $16,842.00), conversion of the truck (of $40,000.00), wall panel plant lease obligations (of $41,415.22), attorney's fees (of $573,343.27) costs (of $16,756.64) and related interest.

---

employer breaches the employment agreement". Heslop v. Bank of Utah, 839 P.2d 828, 840 (Utah 1992).

Dated this 7th day of September, 2007.

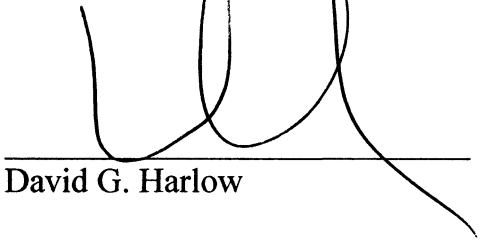
By: 

David G. Harlow, Attorney for Defendant/Appellant
1855 N. Oak Lane
Provo, Utah 84604

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Appellant's Brief were duly served upon counsel for plaintiff/appellee by placing said copies in the United States Mail, postage prepaid, on this 7th day of September, 2007, addressed as follows:

Richard D. Burbidge, Attorney for Plainitff/Appellee
Burbidge & Mitchell
Parkside Tower
215 South State Street, Suite 920
Salt Lake City, UT 84111



David G. Harlow

Tab 1

ADDENDUM
ATTACHMENT 1

Listing by Issue Reference (Issues a through rrrrr) of Citations to the Record Showing that Issues Presented Were Preserved in the Trial Court

a) R. 2168-2170; 2365-2379; 2387-2390;

b) R. 2171-2172; 2365-2379; 2387-2390; 2490-2530; 2745-2747;

c) R. 2171-2172; 2745-2747; 2894-2895; 2972-2973;

d) R. 2171-2172; 2977;

e) R. 2171-2172; 2365-2379; 2387-2390; 2490-2530; 2745-2747;

f) R. 2162-2163; 2365-2379; 2387-2390; 2490-2530; 2714-2716;

g) R. 2829;

h) R. 2901-2902; 2937-2938; 2949-2950;

i) R. 2900-2901; 2937; 2948-2949;

j) R. 2953;

k) R. 2899-2900; 2936-2937; 2947-2949; 2954; 2959;

l) R. 2948-2949; 2959;

m) R. 2900-2902; 2937-2938; 2949-2950; 2958;

n) R. 2702-2749; 2949; 2958;

o) R. 2171-2172; 2745-2747; 2843; 2894-2895; 2957;

p) R. 2170-2171; 2743-2744; 2836-2837; 2843; 2957;

q) R. 2170-2171; 2743-2744; 2836-2837; 2843; 2967;

r) R. 2170-2171; 2836-2837; 2843;

s) R. 2170-2171; 2743-2744; 2836-2837; 2843; 2949; 2957; 2967;

t) R. 2743-2744; 2836-2837; 2843; 2967;

u) R. 2170-2171; 2743-2744; 2837-2837; 2843; 2966-2967;

v) R. 2170-2171; 2743-2744; 2836-2837; 2843; 2966-2967;

w) R. 2170-2171; 2743-2744; 2836-2837; 2843; 2966-2967;

x) R. 2160-2162; 2739-2742; 2833-2835; 2843; 2892-2894; 2965-2966;

y) R. 2160-2162; 2739-2742; 2833-2835; 2843; 2892-2894; 2965-2966;

z) R. 2160-2162; 2739-2742; 2833-2835; 2843; 2892-2894; 2965-2966;

aa) R. 2160-2162; 2739-2742; 2833-2835; 2843; 2892-2894; 2965-2966;

bb) R. 2160-2162; 2739-2742; 2833-2835; 2843; 2892-2894; 2965-2966;

cc) R. 2160-2162; 2739-2742; 2833-2835; 2843; 2892-2894; 2965-2966;

dd) R. 2840-2843; 2974-2976;

ee) R. 3348 at p. 1690, line 13 through p. 1709, line 17; and p. 1719, line 15 through p. 1724, line 24;

ff) R. 3348 at p. 1687, line 5 through p. 1726, line 13;

gg) R. 2840-2843; 2974-2976;

hh) R. 2840-2843; 2974-2976;

ii) R. 2840-2843; 2895-2896; 2974-2976;

jj) R. 2840-2843; 2895-2896; 2935; 2974-2976;

kk) R. 2840-2843; 2895-2896; 2935; 2974-2976;

ll) R. 2171-2172; 2745-2747; 2831-2833; 2843; 2894-2895; 2968-2970;

mm) R. 2071-2072; 2745-2747; 2831-2833; 2843; 2956;

nn) R. 2171-2172; 2831-2833; 2843; 2971-2974;

oo) R. 2171-2172; 2971-2974;

pp)R. 2171-2172; 2745-2747; 2894; 2971-2974;

qq)R. 2171-2172; 2745-2747; 2837-2840; 2843; 2894-2895; 2971-2974;

rr) R. 3348 at p. 1766, line 16 through p. 1778, line 24;

ss) R. 3348 at p. 1673, line 3 through p. 1677, line 22;

tt) R. 2171-2172; 2745-2747; 2837-2840; 2843; 2894-2895;

uu)R. 2745-2747;

vv)R. 2171-2172; 2745-2747; 2837-2840; 2843; 2894-2895; 2949; 2970-2971;

ww) R. 2171-2172; 2745-2747; 2837-2840; 2843; 2894-2895; 2949; 2957;

xx)R. 2837-2840; 2843; 2970;

yy)R. 2837-2840; 2843;

zz) R. 2837-2840; 2843;

aaa) R. 2171-2172; 2837-2840; 2843;

bbb) R. 2716-2738; 2831-2833; 2843; 2896-2898; 2968-2970;

ccc) R. 2716-2738; 2896-2898;

ddd) R. 2716-2738; 2831-2833; 2843; 2896-2898; 2956;

eee) R. 3349 at p. 1155, line 23 through p. 1192, line 1;

fff)R. 2716-2738; 2831-2833; 2843; 2896-2898;

ggg) R. 3347 at p. 1313, line 4 through p. 1319, line 22;

hhh) R. 2171-2172; 2745-2747; 2831-2833; 2843; 2956;

iii) R.2716-2738; 2831-2833; 2843; 2896-2898; 2956; 2968-2970;

jjj) R. 2708; 2968;

kkk) R. 3350 at p. 1886, lines 5 through 24;

lll) R. 2716-2738; 2956; 2968;

mmm) R.2716-2738; 2956; 2968;

nnn) R. 3348 at p. 1619, lines 2 through 5;

ooo) R. 3347, at p. 1396, lines 4 through 16;

ppp) R. 3348 at p. 1604, line 10 through p. 1619, line 1;

qqq) R.3348 at p. 1615, line 22 through p.1618, line 17;

rrr)R. 2716-2738;

sss) R. 2716-2738;

ttt) R. 3349 at p. 1195, line 22;

uuu) R. 3347 at p. 1281, line 18 through p. 1285, line 24;

vvv) R. 3347 at p. 1379, line 13 through p. 1382, line 4;

www) R. 2739-2742; 2831; 2843; 2956;

xxx) R. 2160-2162; 2739-2742; 2831; 2843; 2956;

yyy) R. 2716-2738; 2831-2833; 2843; 2896-2898; 2956;

zzz) R. 2160-2162; 2739-2742; 2831; 2843; 2956;

aaaa) R.2160-2162; 2708-2709; 2830-2831; 2843; 2892-2894; 2955-2956; 2964;

bbbb) R. 2160-2162; 2708-2709; 2830-2831; 2843; 2892-2894; 2955-2956; 2964;

cccc) R. 2160-2162; 2708-2709; 2830-2831; 2843; 2892-2894; 2955-2956; 2964;

dddd) R. 2160-2162; 2708-2709; 2830-2831; 2843; 2892-2894; 2955-2956; 2964;

eeee) R. 2160-2162; 2708-2709; 2830-2831; 2843; 2892-2894;

ffff) R. 2160-2162; 2708-2709; 2830-2831; 2843; 2892-2894; 2964;

gggg) R. 2709-2714; 2955; 2959-2962;

hhhh) R. 2709-2714; 2955; 2959-2962;

iiii) R. 2962; R. 3350 at p. 1800, line 20 through p. 1802, line 12;

jjjj) R. 3350 at p. 1798, line 9 through p. 1800, line 22;

kkkk) R.3350 at p. 1804, line 9 through p. 1805, line 10; p. 1845, lines 14 through 25; p. 1853, line 12 through p. 1854, line 12;

llll) R. 2163-2164; 2955;

mmmm) R. 2163-2164; 2842-2843; 2955;

nnnn) R. 2163-2164; 2955;

oooo) R. 2163-2164; 2955;

pppp) R. 2162-2163; 2714-2716; 2829; 2842; 2954; 2963-2964;

qqqq) R. 2162-2163; 2714-2716; 2829; 2842; 2954; 2962-2963;

rrrr) R. 2162-2163; 2714-2716; 2954; 2962-2963;

ssss) R. 2162-2163; 2714-2716; 2829-2830; 2842; 2955; 2963-2964;

tttt) R. 3348 at p. 1680, line 24 through p. 1684, line 6;

uuuu) R. 2162-2163; 2714-2716;

vvvv) R. 2162-2163; 2714-2716;

wwww) R. 2162-2163; 2714-2716;

xxxx) R. 3350 at p. 2057, line 7 through p. 2060, line 2;

yyyy) R. 2704-2738;

zzzz) R. 2703-2738;

aaaaa) R. 2731-2736; 2898-2899;

bbbbb) R. 2731-2736; 2898-2899;

ccccc) R. 2731-2736;

ddddd) R. 2716-2738; 2896-2898;

eeeee) R. 2716-2738; 2896-2898;

fffff) R. 3350 at p. 2028, line 16 through p. 2029, line 4;

ggggg) R. 3079; 3087-3094; 3307-3308;

hhhhh) R. 3062-3066; 3067-3073; 3087-3094; 3303-3312;

iiiii) R. 3062-3066; 3067-3073; 3087-3094; 3303-3312;

jjjjj) R. 3062-3066; 3067-3073; 3303-3312;

kkkkk) R. 3087-3094; 3303-3312;

lllll) R. 3087-3094; 3303-3312;

mmmmm) R. 2985-2987; 3297-3302;

nnnnn) R. 2985-2987; 3297-3302;

ooooo) R. 2985-2987; 3297-3302;

ppppp) R. 2985-2987; 3297-3302;

qqqqq) R. 3317-3318;

rrrrr) R. 3290-3297.